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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DALE CORDOVA,

Defendant and Appellant.

H022732

(Santa Clara County
Super.Ct.No. C9941986)

I. Statement of the Case

A jury convicted defendant Dale Cordova of two counts of assault with a firearm, willful discharge of a firearm with gross negligence, and first degree burglary. In connection with these offenses, the jury found that defendant personally used a firearm, and that in one assault and the burglary, he personally inflicted great bodily injury.¹ Thereafter, the court found that defendant had five strike prior convictions and three serious felony prior convictions and previously served four prison terms. The court imposed consecutive terms of 25 years to life for the burglary and one assault plus consecutive enhancements totaling 15 years. The court stayed terms for the other offenses and either dismissed or stayed the remaining enhancements.

¹ The jury acquitted defendant of one count of attempted murder and willful discharge of a firearm and was unable to reach a verdict on a second count of attempted murder.

On appeal from the judgment, defendant claims the court erred in admitting evidence of a prior threat against a victim. He also claims the court abused its discretion in declining to dismiss at least two of his strike prior convictions.

We find no merit to these claims and affirm the judgment.

II. Facts

Rebecca M. started a relationship with defendant while her husband was incarcerated. It ended after a few months, although they still liked each other, and defendant hoped they might get back together when she got a divorce. Thereafter, Rebecca started another relationship with a man named Mike. This relationship ended when Mike returned to prison for a parole violation. At that point, Rebecca and defendant's relationship rekindled, and he lived with her and her daughter on and off.

On September 1, 1999, Mike was released from prison. On the evening of September 4, Rebecca was home with her daughter Jamie, two friends Sheila and Venus, and Mike. She and Mike had planned to go to Modesto together. Mike and Jamie were in the living room, and Rebecca, Sheila, and Venus were in the bedroom with the door shut. At one point, Rebecca heard a car pull up and saw defendant outside. She was nervous because this would be the first encounter between defendant and Mike.

Jamie later told Deputy Sheriff David Lera of the Santa Clara County Sheriff's Department that when defendant arrived, she and Mike were on the couch watching television. She heard her Uncle Joseph say, " 'Get 'em Dale,' " and defendant entered carrying a silver gun. He aimed it at Mike, fired, but missed. Mike and Jamie fled, and Jamie called the police from a neighbor's house. Later, she saw defendant and Joseph driving away together.

Venus testified that she, Rebecca, and Sheila were in the bedroom when defendant drove up. Later, she heard a shot, and she and Sheila headed for the closet. Rebecca went to a door and struggled against it, as if someone were trying to come in. From inside the closet, Venus heard a scuffle, a gunshot, and a person say, " 'bitch.' " After a

period of silence, she heard Jamie screaming and Mike say something like “ ‘Becky where are you hit?’ ” Venus and Sheila emerged from the closet and saw Mike with Rebecca. Venus left before police arrived because there was a felony warrant out for her.²

Sheila testified that she, Rebecca, and Venus were in the bedroom, when they heard a door slam and a gunshot. She and Venus went into the closet, and Rebecca went to a door to lock it. A short time later, she heard footsteps and a gunshot in the bedroom. When she came out of the closet, she saw Rebecca on the floor with blood on her. Deputy Sheriff Chuck Chilton interviewed Sheila that night, and at that time she told him she heard the screen door slam, a gunshot in the living room, and Jamie shout, “ ‘Dale.’ ”

Mike testified that he and Jamie were on the couch, and he was asleep. Suddenly, a loud noise woke him up, and his ears were ringing. He saw a blur in front of him and instinctively covered his face with his arms. The blur then went toward Rebecca’s room. Eventually, he went outside and saw Joseph and someone else. Mike did not recall telling police that Jamie had woken him up and that defendant came in, shot him, and then went to Rebecca’s room. He did not recall telling police that he smelled gunpowder or that his ears were ringing because of a gunshot close to him. He also did not recall telling police that while he was outside with Joseph, defendant came out.³

Rebecca could not remember much of what happened after defendant arrived. She said she was in her bedroom, and someone came in and shot her in the head. Her injuries took three months to heal and she needs therapy because she has memory problems and trouble speaking.

² Venus testified that at the time of the incident, she was on parole, having been convicted of drug offenses and auto theft. She said she smoked marijuana that day and was coming down from methamphetamines.

³ Mike’s interview with the police was taped, and the tape was played for the jury.

Joseph told Detective Michael Flood of the Santa Clara County Sheriff's Department that he did not know defendant had a gun when he approached the house. He said defendant went to Rebecca's house to collect a debt and " 'beat the shit out of Mike.' " Joseph testified that defendant went to the front door, entered, and pulled a gun. Joseph heard a " 'click, click' " and defendant say " 'Get up, mother-fucker.' " Then there was a gunshot. Defendant came out later, and they drove away. In the car, defendant said, " 'Fucking Becky. I love her. I care for her. She's a fine woman. I fucking told her. I fucking told her.' " Defendant said that when he went to hit Rebecca with the gun, it went off. He did not think she got hit.

Deputy Lera got a call about the shooting and quickly responded. Inside the house, Lera observed that the bedroom door was locked, but the doorjam was splintered, and the door itself was cracked. After speaking with Jamie, Lera put out a bulletin to look for defendant and Joseph. Defendant was later apprehended after a standoff with a SWAT team.

Rebecca's sister Dianna and her husband John went to Rebecca's house two days after the shooting. Inside defendant's van, which was parked outside, John found a box of .45 caliber handgun rounds behind the front seat. Inside the apartment, Dianna found a .45 caliber shell casing. Bullet fragments found at the scene were consistent with a .45 caliber bullet.

Dianna testified that at the time of the shooting, there was a rumor that Rebecca and Mike were going to get back together, and it was common knowledge that defendant did not want that to happen. Dianna said defendant and Rebecca were angry at each other concerning Mike. The weekend before the shooting Dianna spoke to defendant on the phone. According to Dianna, defendant was angry and upset because Rebecca had asked him to leave. He said that when he refused to go, they argued, and she told him to leave and tried to push or kick him out. Defendant then stated to Dianna, " . . . [D]idn't she realize that, you know, if she does that, if she does something like that again, that he

could cause some damage. ‘Doesn’t she know that I could really hurt her?’ ” Dianna became concerned and told Rebecca what defendant had said.

III. Evidence of a Prior Threat

Defendant contends that the trial court abused its discretion in overruling his objection to Dianna’s testimony about his threat to harm Rebecca.

At an Evidence Code section 402 hearing on the admissibility of defendant’s statement, Dianna testified that defendant told her he was upset about being kicked out of the house. He told her he could not be around her any more because “if she went at him another time,” he could cause some “real damage to her.” Dianna thought that because Rebecca had gone at him physically, perhaps kicked him, he would hurt her if she “kept it up.” However, Dianna did not know whether she physically kicked defendant, but the gist of his statement was that if she tried to do it again, he would hurt her. She later told Rebecca what he had said—that he needed to stay away from her, and if she went at him, he would hurt her. Dianna said Rebecca denied attacking him and was very nervous because she did not want defendant to find out that Mike had been at her house and they were planning to go to Modesto.

The court understood defendant’s statement to mean that if Rebecca physically hit or kicked him again, he could hurt her. The prosecutor argued, however, that Dianna’s reference to kicking could also be understood to mean that defendant was generally angry at Rebecca for making him move out, i.e., figuratively kicking him out of the house. Upon further questioning, Dianna said that defendant was angry about being kicked out of the house and no longer being a permanent resident in her home. Although they did not talk about Mike on the phone, Dianna understood that defendant was angry and would feel angry if Mike were there.

The prosecutor argued that defendant’s conditional threat was evidence that he was prepared to harm Rebecca if he got sufficiently angry, and its conditional nature affected only its weight, not admissibility. He further argued that defendant was angry at

having to move out, regardless of whether Rebecca literally or figuratively kicked him out. In this regard, the prosecutor asserted that the evidence revealed that defendant's anger was at being out of the house especially if Mike was back in.

The trial court acknowledged that the evidence was prejudicial. However, on the theory that defendant's threat was based, at least in part, on defendant's anger at her for making him move out and becoming involved with Mike, the court ruled the evidence admissible under Evidence Code section 1101, subdivision (b) to prove defendant's mental state when he entered the house and fired his gun.⁴

According to defendant, Dianna's testimony established only that he threatened to hurt Rebecca if she *physically* attacked him again and not if Mike moved in or she continued to see him. Given the specific and conditional nature of threat, defendant claims it had little tendency to prove his mental state. Moreover, any probative value was outweighed by its potential prejudice, in that, it was negative character evidence of a propensity for violence. Defendant argues that this prejudice was compounded because the court did not give an instructing limiting consideration of the evidence to his mental state. Thus the jury was free to consider it evidence of a criminal propensity for violence. We are not persuaded.

⁴ As noted, defendant was charged with burglary, attempting to kill both Mike and Rebecca, assault with a firearm, and discharging a weapon.

Evidence Code section 1101 provides in pertinent part: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

On appeal, we examine the evidence in the light most favorable to the court's ruling and determining whether the court abused its discretion, that is, whether it's ruling was arbitrary or irrationally or otherwise exceeded the bounds of reason. (*People v. Kipp* (1998) 18 Cal.4th 349, 370; *People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Preyer* (1985) 164 Cal.App.3d 568, 573-574; *Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 152.)

Generally, threats against a victim are relevant to prove the defendant's intent in a prosecution for murder or attempted murder. (See *People v. Lew* (1968) 68 Cal.2d 774, 778; cf. *People v. Lang* (1989) 49 Cal.3d 991; *People v. Rodriguez* (1986) 42 Cal.3d 730.)

For example, in *People v. Thompson* (1988) 45 Cal.3d 86, the defendant was charged with raping and murdering a friend's mistress. The prosecution sought to introduce evidence that defendant planned an expedition to Southeast Asia to smuggle refugees, gold, and possibly cocaine; he planned to get a boat for this venture by killing the owner's son; and although he initially planned to smuggle refugees out of Thailand, he later decided it would be easier to kill them after obtaining their gold. (*Id.* at p. 108.) The prosecution also sought to introduce evidence that before the victim was raped and murdered, defendant said, among other things, that he would kill anyone who got in the way of his plan. (*Id.* at pp. 108-109.) The prosecution's theory was that the defendant's trip was important to him and his threat to kill anyone who interfered with his plan revealed a possible motive for the killing the victim after the alleged rape: If she disclosed the rape, he might be kept from leaving the country. The trial court admitted the evidence over defense objections that the evidence was highly inflammatory and portrayed him as a violent and dangerous person. (*Ibid.*)

On appeal, the California Supreme Court found no abuse of discretion. It noted that the threat revealed a possible motive to kill the victim—i.e., to prevent her from reporting the rape—and that motive was an important issue because the defendant

claimed he and the victim had consensual sexual relations. Under the circumstances, establishing that defendant had threatened to kill anyone who got in the way of his Southeast Asian scheme was an important step toward showing that he had a motive to kill the victim. Thus, his generic threat was admissible to prove his state of mind. Although the prosecution presented no direct evidence that the victim fell within the scope of the threat, in that she did not attempt to thwart the defendant's plan, the evidence was admissible because the prosecution later introduced evidence that indirectly brought her within the scope of his threat. (*People v. Thompson, supra*, 45 Cal.3d at pp. 109-110; see *People v. Lang, supra*, 49 Cal.3d at p. 1014 [discussing *Thompson*].)

In *People v. Barnett, supra*, 17 Cal.4th 1044, the defendant was charged with murdering a man named Eggett. The trial court admitted evidence that a year before the murder, the defendant had threatened to kill a woman but Eggett intervened and later urged the woman to file a police report. The California Supreme Court upheld the admission of the defendant's threat, finding that it relevant to show the roots of the defendant's hostility toward Eggett and thus demonstrate a motive to kill him. (*Id.* at p. 1118.)

Here, as in *Thompson* and *Barnett*, motive and intent upon entering Rebecca's house and using his gun were key issues. Although Dianna's Evidence Code section 402 hearing testimony supports defendant's view that he threatened to hurt Rebecca if she *physically* attacked him, her testimony also arguably supports the prosecutor's theory that the threat was more broadly based on defendant's anger at Rebecca for not only making him leave but also replacing him with Mike. As such, the threat was highly probative of defendant's motive and intent. Moreover, evidence admitted before and after Dianna's testimony supported this broader understanding of the threat.

As noted, Lera testified that according to Jamie, the *first* thing defendant did upon entering and seeing Mike was to shoot at him. Flood testified that according to Joseph, defendant went to the house intending, among other things, to “ ‘beat the shit out of

Mike.’ ” However, when defendant entered, Joseph heard the sound of a gun-slide clicking, defendant telling Mike to get up, and then a gunshot. When viewed in light of this evidence, defendant’s threatening statement became highly probative of his motive and intent. On the other hand, the threat was not so inflammatory and indicative of a violent criminal propensity that it had a unique tendency to evoke an emotional bias against defendant as an individual. (See *People v. Barnett*, *supra*, 17 Cal.4th at pp. 1118-1119.) Indeed, the threats in *Thompson* and *Barnett* had a stronger tendency to do so.

In any event, we would find the court’s alleged error in admitting defendant’s statement harmless. Lera’s and Flood’s testimony noted above plus the fact that defendant armed himself before going to Rebecca’s house constitutes overwhelming evidence that he entered with the intent to commit a felony. This evidence plus the evidence that after assaulting Mike, defendant violently forced his way into Rebecca’s room, breaking the doorjam and door, and then shot her in the head further constitutes overwhelming evidence of his general intent to commit the assaults. Contrary to defendant’s claim of prejudice—including the prejudice from the lack of a limiting instruction—it is not reasonably probable defendant would have obtained a more favorable verdict had the evidence been excluded. (See *People v. Watson* (1956) 46 Cal.2d 818, 836; cf. *People v. Welch* (1999) 20 Cal.4th 701, 749-750 [applying *Watson* standard].) In this regard, we reiterate that the evidence had probative value concerning defendant’s mental state. On the other hand, the prosecutor did not improperly suggest that the threat showed a propensity to commit the charged offenses. We further note that the jury acquitted defendant of one count of attempted murder and was unable to reach a verdict on the other count, indicating that the jurors were not unduly or prejudicially

affected by evidence of the threat and were able to analyze the evidence in a careful, thoughtful, and dispassionate way.⁵

IV. Prior Strike Convictions

Defendant contends the trial court abused its discretion in not dismissing at least two of his strike prior convictions in furtherance of justice. This claim is meritless.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the California Supreme Court warned that the trial court's discretion to dismiss strikes in furtherance of justice is "limited." (*Id.* at p. 530.) The court explained that trial courts must consider both the constitutional rights of the defendant and the interests of society. (*Ibid.*) Thus, they may not dismiss a strike solely to accommodate judicial convenience, relieve court congestion, or respond to a guilty plea. (*Id.* at p. 531.) Nor may courts dismiss a strike solely because it disagrees with the harsh effects the Three Strikes law would have on a defendant and without considering the defendant's background, criminal history, the nature of his present offense, and other relevant considerations. (*Ibid.*)

For example, in *People v. Williams* (1998) 17 Cal.4th 148 the defendant pleaded guilty to driving a vehicle under the influence of a drug. His 19-year criminal history included strike convictions for attempted robbery and rape as well as non-strike convictions for spousal battery, possession of firearms, and driving under the influence. The trial court dismissed one of the strikes because it was 13 years old and the defendant had not committed another violent crime since that conviction. (*Id.* at pp. 154, 156, fn. 3, 157.) The California Supreme reversed, holding that the trial court had abused its

⁵ We reject defendant's claim that the evidence was so irrelevant and inflammatory that its admission violated his right to due process and his alternative claim that defense counsel was ineffective for not specifically raising a due process objection to the evidence. Defendant's reliance on *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 and *Henry v. Estelle* (9th Cir. 1993) 993 F.2d 1423 is misplaced. Simply put, the evidence of defendant's threat is not comparable to the inflammatory evidence admitted in those cases.

discretion. (*Id.* at pp. 162-164.) In discussing the relevant factors that govern the proper exercise of discretion, the Supreme Court stated that no weight should be given to “factors extrinsic to the [Three Strikes] scheme.” (*Id.* at p. 161.) On the other hand, the trial court must accord “preponderant weight . . . to factors intrinsic to the scheme, such as the nature and circumstances of the defendant’s present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects.” (*Ibid.*) Ultimately, a court must determine whether “the defendant may be deemed outside the scheme’s spirit, in whole or in part.” (*Ibid.*)

More recently, in *People v. Garcia* (1999) 20 Cal.4th 490, the court reiterated the principles set forth in *Romero* and *Williams* and added that “a defendant’s sentence is also a relevant consideration when deciding whether to strike a prior conviction allegation; in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences.” (*Id.* at p. 500.)

On appeal where the trial court has declined to dismiss strike prior convictions, the defendant bears a heavy burden to show that the court’s conclusion that the defendant falls within the spirit of the Three Strikes law is manifestly unreasonable. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

In support of his request to dismiss, defendant recounted his personal history. In brief, he was born in 1962. His father had his own transmission business, and his mother raised him and his siblings. While he was still a child, one of his brothers died unexpectedly. The loss drove his father to drink, take drugs and become abusive. Ultimately defendant’s father abandoned the family, and, in 1976, he was imprisoned for selling heroin. Thereafter, defendant’s older brother became a drug addict, abused the family, and died in 1992.

As a result of his first brother’s death, defendant’s school performance deteriorated, and in his early teenage years, he began to drink and take drugs. In 1975, he was cited several times for malicious mischief. His criminal conduct progressed to petty

theft, resisting arrest, and commercial burglary. He was sent to a boy's ranch for over two years and successfully completed his commitment in 1979. However, in 1981, he was convicted of attempted burglary. In 1984, he was convicted of two counts of robbery, based on a single incident where he snatched the purses of two women. Later, in 1992, he was convicted of two counts of felony battery. None of his prior offenses involved the use of a firearm.

Defendant's criminal history includes numerous serious felony offenses, and over time, he has become more dangerous and violent, culminating in his use of a firearm and infliction of a potentially fatal injury on Rebecca. Under the circumstances, the trial court could reasonably conclude that defendant is within the spirit of the Three Strikes law and deserving of a two-strike term, in that, he is a recidivist offender, his criminal conduct has increased in seriousness, and he poses a substantial danger to society. Moreover, although defendant's childhood was not perfect, the trial court could reasonably find that it did not so mitigate past and current criminal conduct as to warrant the dismissal of prior convictions so that a lesser sentence could be imposed.

Citing *People v. Benson* (1998) 18 Cal.4th 24, defendant argues that in exercising its discretion, the trial court erred in not treating the prior two robberies as only one strike because they occurred on the same occasion as part of a single criminal episode of purse snatching. However, defendant's reliance is misplaced. In *Benson*, the court held that the Three Strikes law does not preclude the trial court from considering two offenses against the same victim during a single course of conduct to be two strikes. In dicta, however, the court stated, "Because the proper exercise of a trial court's discretion under [Penal Code] section 1385 necessarily relates to the circumstances of a particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of

conduct—that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.” (*Id.* at p. 36, fn. 8; see *People v. Sanchez* (2001) 24 Cal.4th 983, 993 [quoting *Benson* dicta].)

Here, the purse snatching did not involve a single act that resulted in multiple convictions. (See, e.g., *People v. Ortega* (2000) 84 Cal.App.4th 659 [single act resulted in convictions for attempted voluntary manslaughter and assault with a deadly weapon].) Rather, defendant committed separate acts against different victims. He was as culpable as a person who robs two people on different days. Nothing in the *Benson* dicta suggests that the trial court here was compelled to treat defendant’s robberies as one strike or that its failure to do so under the particular circumstances of this case was, or could have been, an abuse of discretion.

Defendant notes that in declining to dismiss any strikes, the court stated, “This case did go to a trial over which I presided, and I’m quite familiar with the facts of the case. [¶] Seems to have been a case where the defendant took it upon himself to try to kill two people, succeeded in wounding one, and the other one escaped.” Defendant notes, however, that the jury acquitted him of one count of attempted murder and was unable to reach a verdict on the other count. Citing *People v. Cluff* (2001) 87 Cal.App.4th 991, defendant argues that the trial court erred in disregarding the jury’s verdict and erroneously basing its decision on a fact—that he attempted to kill two people—not supported by the evidence.

In *Cluff*, the defendant committed a technical violation of the law in failing to comply with the annual-update registration requirement for sex offenders. The trial court declined to dismiss a strike because it found that the defendant knowingly and intentionally tried to hide his address. On appeal, the court found because there was no evidence of a knowing and intentional effort to hide or violate the highly technical registration requirement. Thus, because the trial court’s ruling was based on pure

speculation, the court found an abuse of discretion and remanded the matter for a new hearing on the issue.

Cluff is distinguishable. First, the evidence supports the trial court's observation that it seemed as if defendant tried to kill Mike and Rebecca. The jury's verdicts indicate only that jurors had a reasonable doubt about one or more elements of the charge of attempted murder. Thus, the trial court's ruling here was not based on pure speculation. Moreover, the record amply supports the trial court's ruling. Under the circumstances, *Cluff* does not convince us that the trial court abused its discretion, and no purpose would be served by remanding for a new hearing.

V. Disposition

The judgment is affirmed.

Wunderlich, J.

WE CONCUR:

Premo, Acting P.J.

Elia, J.